

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 62632-9-I
Respondent,	)	(consol. with No. 62633-7-I)
	)	
v.	)	DIVISION ONE
	)	
RICHARD EDWARD HODGES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	FILED: June 1, 2010
	)	

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Dwyer, C.J. — After observing Richard Hodges during a lengthy colloquy and considering multiple competency evaluations and the parties' stipulations, the trial court accepted Hodges' guilty plea to residential burglary and possession of cocaine. We reject Hodges' contentions that his guilty plea was involuntary and that the trial court should have continued the plea hearing and ordered an additional competency evaluation. The record also fails to support Hodges' claim that the court applied an incorrect legal standard when it rejected his request for a mitigated exceptional sentence. We therefore affirm.

I

Following two separate incidents in April 2007, the State charged Hodges with one count of residential burglary and one count of possession of cocaine. Hodges, who had an extensive criminal record and history of mental problems, was also facing trial on two 2006 charges.

On May 1, 2007, the trial court ordered that Hodges undergo a competency evaluation at Western State Hospital. In a report dated May 29, 2007, Dr. Gregg Gagliardi concluded that although Hodges appeared to be suffering from significant mental health problems, including possible chronic paranoid schizophrenia, these problems were not sufficiently severe to render him incapable of appreciating the nature of the pending legal proceedings or incapable of assisting defense counsel. Gagliardi also believed that Hodges had been malingering in an effort to obtain outpatient treatment in lieu of incarceration or to obtain prescription pain medication. On June 7, 2007, with the agreement of both the deputy prosecutor and defense counsel, the trial court found Hodges competent to stand trial on all pending charges.<sup>1</sup>

On October 17, 2007, the trial court ordered another competency evaluation for the 2007 charges. Following an examination on December 6, 2007, Dr. Gagliardi found that Hodges was not currently competent and recommended an MRI and a neuropsychological examination. After conducting the neuropsychological examination, Dr. Christopher Garver concluded that Hodges had failed multiple symptom validity tests and that his self-reported complaints appeared exaggerated. Garver found no clear neurological reasons for Hodges' problems and determined that Hodges' learning abilities were within normal limits. Garver also concluded that there was a significant possibility of malingering.

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<sup>1</sup> Trial on the 2006 charges began on July 16, 2007. This court recently affirmed the resulting convictions for possession of cocaine and second degree theft, rejecting, among other claims, a challenge to the trial court's decision not to order a competency hearing. State v. Hodges, noted at 154 Wn. App. 1046 (2010).

In January 2008, after considering Garver's report, MRI testing, additional observations, and an interview, Dr. Gagliardi concluded that Hodges was not suffering from an organic mental disorder, that he had exaggerated or feigned symptoms of a mental disorder during Dr. Garver's examination, that Hodges' general mental condition had improved in recent weeks, in part because of antipsychotic medication, and that he now had the capacity to understand the proceedings against him and to assist defense counsel. On March 10, 2008, after considering Gagliardi's report and the agreement of both parties, the trial court found Hodges competent to stand trial.

On April 8, 2008, the trial court considered Hodges' request to plead guilty to the 2007 charges. During the hearing, Hodges repeatedly expressed his desire to plead guilty but appeared to be confused about the nature of the drug and burglary charges and indicated an inability to recall prior discussions with defense counsel. Defense counsel informed the court that Hodges had "some mental problems" but believed they were not significant enough to establish diminished capacity or incompetence. Eventually, the court determined that it would not accept Hodges' guilty plea on that day, noting that Hodges did not appear to have sufficient understanding of the process and that the length of the hearing was holding up other pleas.

Following lengthy hearings on April 15 and April 16, 2008, the trial court concluded that Hodges' decision to plead guilty was knowing, intelligent, and voluntary and accepted his plea.

A short time later, apparently in response to a defense social worker's

concern that Hodges' mental status had deteriorated following the plea hearing, the trial court ordered another competency evaluation. In a report dated June 24, 2008, Dr. Gagliardi noted that Hodges continued to describe symptoms inconsistent with known clinical phenomena, but that he also clearly expressed his preference for inpatient treatment over prison confinement. Gagliardi was unable to determine if Hodges' mental condition had deteriorated, but recommended further inpatient treatment in the interest of erring "on the side of caution." On September 25, 2008, the trial court reviewed the July 21, 2008 evaluation that found Hodges competent and his symptoms under better control. Based on the most recent evaluation and both parties' agreement, the court found Hodges competent to proceed to sentencing.

At sentencing on October 2, 2008, the defense requested a mitigated exceptional sentence, arguing that Hodges' mental condition had significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law. See RCW 9.94A.535(1)(e). The court declined the request and sentenced Hodges to concurrent standard-range terms.

## II

On appeal, Hodges does not challenge the trial court's findings that he was competent at various times during the course of the plea negotiations. Rather, he contends that he was incompetent at the time of his plea hearing and that the trial court therefore erred in accepting his guilty plea as knowing and voluntary. He maintains that the court should have interrupted the plea hearing and ordered an additional competency evaluation in accordance with Chapter 10.77 RCW.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); see also CrR 4.2(d) (trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea"). In addition, RCW 10.77.050 provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." The competency standard for pleading guilty is the same as the competency standard for standing trial and requires that the defendant understand the nature of the charges and be capable of assisting in the defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001).

When determining whether to accept a guilty plea, the trial court has broad discretion to assess the defendant's mental competency. State v. Osborne, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). In making this determination, the court considers all relevant circumstances, including "the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel." Osborne, 102 Wn.2d at 98 (quoting State v. Loux, 24 Wn. App. 545, 548, 604 P.2d 177 (1979)). Hodges' claim that he was not competent to plead guilty is a challenge to the voluntariness of his guilty plea. See State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

Hodges concedes that because he signed a written statement on plea of guilty in compliance with CrR 4.2(g), acknowledged reviewing that statement, and

then participated in an extensive colloquy with the trial court, the presumption of voluntariness is “well nigh irrefutable.” State v. Branch, 129 Wn.2d 635, 642 n.2, 919 P.2d 1228 (1996) (quoting State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)). He argues, however, that his responses and conduct during the plea hearings were sufficient to rebut this presumption and demonstrate that he was incompetent. We disagree.

Hodges correctly notes that the trial court was unable to complete the initial plea hearing on April 8, 2008, because he failed to demonstrate sufficient understanding of the charged offenses and the plea process. But the trial court conducted a lengthy and thorough plea colloquy during hearings on April 15 and April 16, 2008, that supports the court’s determination that Hodges’ plea was knowing and voluntary.

The plea hearing began on the afternoon of April 15, 2008. Defense counsel, in response to a specific question, advised the court that Hodges was competent to proceed. Hodges acknowledged that he had reviewed the statement of defendant on plea of guilty with counsel and that he had reviewed and understood the charges. During a detailed colloquy, the trial court carefully reviewed with Hodges the charges, the specific rights that he was giving up by pleading guilty, the maximum and recommended sentences, and the fact that the sentencing court was not bound by the parties’ sentencing recommendations.

At about 4:00 p.m., before the trial court completed the plea colloquy, Hodges told his counsel that he was confused about certain matters. The trial court then continued the hearing to the following morning.

When the hearing resumed, defense counsel advised the court that he believed Hodges had become tired during the prior hearing and had lost focus. Because Hodges appeared unclear about precisely which documents he had signed the previous day, the trial court conducted a complete colloquy from the beginning, before accepting Hodges' plea as knowing and voluntary.

Hodges suggests that he may have pleaded guilty in the mistaken belief that he would be sentenced to a mental health treatment program. But Hodges repeatedly acknowledged his understanding that a treatment program was not part of the plea agreement and that the sentencing court was not obligated to following the parties' sentencing recommendations. He also acknowledged that he was not pleading guilty because of any threats or other promises.

During the lengthy plea colloquy, the trial court had an ample opportunity to observe Hodges' conduct, appearance, and demeanor. Although Hodges occasionally lost focus, asked questions about matters not directly relevant to the plea process, and exhibited some confusion, he answered most questions directly and appropriately, often after consulting with counsel. When Hodges expressed confusion or uncertainty, the trial court repeated or modified the questions, probing whether Hodges was expressing understanding or only what he thought the court wanted to hear.

In addition to the colloquy, the trial court was also aware of the multiple competency evaluations and findings of competency, the determinations that Hodges was malingering or exaggerating symptoms in an effort to obtain inpatient treatment, and the repeated assurances of defense counsel that Hodges was

competent. See State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004) (defense counsel's opinion as to the defendant's competence carries considerable weight with the court). The most recent finding, with the agreement of counsel, had been entered on March 10, 2008, about one month prior to the plea hearing.

Under the circumstances, Hodges has failed to make any showing that the trial court erred in accepting his guilty plea as knowing and voluntary.

In the alternative, Hodges contends that the trial court should have recessed the plea hearing and ordered a competency review in accordance with Chapter 10.77 RCW. Under RCW 10.77.060(1)(a), whenever "there is reason to doubt" the defendant's competency, the trial court is required to appoint experts and order a formal competency hearing. The court's decision on whether to order a competency examination is reviewed for an abuse of discretion. State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009).

When determining whether to order a competency evaluation under RCW 10.77.060, the court considers "the 'defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.'" PRP of Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)). These are the same factors that the trial court considered when determining whether to accept Hodges' guilty plea. The court did not abuse its discretion by not ordering an additional competency evaluation under RCW 10.77.060.<sup>2</sup>

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<sup>2</sup> Because the trial court did not abuse its discretion when it failed to order an additional competency evaluation, we do not address the State's contention that defense counsel's repeated stipulations to Hodges' competency resulted in a waiver of his due process rights



III

Hodges contends that the sentencing court erred as a matter of law when it declined to impose a mitigated exceptional sentence under RCW 9.94A.535(1)(e), which permits the court to consider:

The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

Imposition of an exceptional sentence under RCW 9.94A.535(1)(e) is permissible only if the record establishes that the defendant's impairment existed independent of any voluntary use of drugs or alcohol. See State v. Allert, 117 Wn.2d 156, 167, 815 P.2d 752 (1991). Hodges claims the sentencing court erroneously believed that any voluntary use of drugs precluded imposition of a mitigated exceptional sentence. But the record fails to support this claim.

At sentencing, Dr. Kent, the defense expert, acknowledged that Hodges had consumed cocaine at the time of the offense and that the cocaine had affected his capacity to appreciate the wrongfulness of his conduct. The court then repeatedly questioned Dr. Kent about the specific effect that cocaine use had on Hodges' mental condition. At one point, the court asked Dr. Kent "[a]re you willing to opine that had he not been on cocaine that day, he would have been just as confused?" When Dr. Kent was able to testify only that it was "possible" that Hodges would have met the standard under RCW 9.94A.535(1)(e) without the effect of cocaine use, the court declined to impose an exceptional sentence. The record therefore indicates

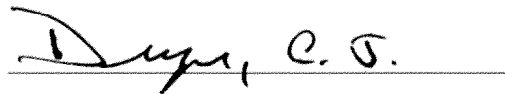
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to the statutory competency procedures under Chapter 10.77 RCW. See Heddrick, 166 Wn.2d at 909.

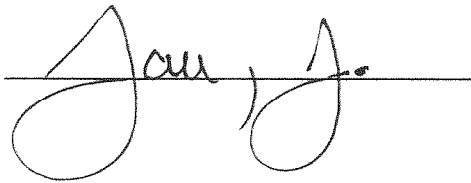
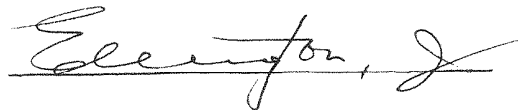
that the sentencing court properly based its decision on a determination of Hodges' mental condition independent of his cocaine use.

Hodges also argues that the sentencing court erred by failing to review other documentation in the record that would have supported an exceptional sentence under RCW 9.94A.535(1)(e). But Hodges fails to identify anything in the record suggesting that the sentencing court did not consider all materials submitted in support of the sentencing recommendation. Nor do the materials that Hodges identifies address whether he met the requirements of RCW 9.94A.535(1)(e) at the time of the offense. Hodges has failed to identify any error.

Affirmed.

A handwritten signature in cursive script, appearing to read "Dyer, C. S.", written over a horizontal line.

We concur:

A handwritten signature in cursive script, appearing to read "Jau, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Eberington, J.", written over a horizontal line.